**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, et al.,

*Plaintiffs,*

v.

BRIAN D. NEWBY

and

UNITED STATES ELECTION ASSISTANCE COMMISSION,

*Defendants*,

and

KRIS W. KOBACH, in his official capacity as the Kansas Secretary of State

*Defendant Intervenor*,

and

PUBLIC INTEREST LEGAL FOUNDATION

*Defendant Intervenor*.

NO. 16-cv-236 (RJL)

**DEFENDANT INTERVENOR KANSAS SECRETARY OF STATE KOBACH'S REPLY BRIEF**

## ARGUMENT

### I. **Plaintiffs are Incorrect in Claiming that Because the Interpretation Memo Failed to Garner Three Votes, the Court Cannot Consider Matters on Which Three Commissioners Have Registered their Agreement.**

Plaintiffs argue that, because the "Interpretation Memo" failed to garner three votes, this Court should essentially ignore it. *See* ECF 146, 1. In support, Plaintiffs cite the Help America Vote Act ("HAVA") requirement that "action[s] which the Commission is authorized to carry out under this chapter may be carried out only with the approval of at least three of its members." ECF 146, at 4 (citing 52 U.S.C. § 20928). There are two problems with Plaintiffs' argument.

First, the statute speaks to "actions" carried out by "the Commission" under "this chapter." 52 U.S.C. § 20928. The chapter does not expressly address the delegation of authority to the EAC Executive Director. Nor does it address the specific questions regarding the Executive Director's authority posed by this Court. Moreover it is unclear whether the views expressed in response to this Court constitute a formal "action" under 52 U.S.C. § 20982. *See Delta Air Lines, Inc. v. Export-Import Bank of United States*, 85 F. Supp.3d 436, 449-50 (D.D.C. Mar. 30, 2015) (rejecting argument that a board vote was required when the district court sought an explanation from the agency for actions taken). In this case, it would be appropriate to look at the Commissioners' independent views of what they believe Mr. Newby's authority is. And for that purpose, the Commissioners are in full agreement that Mr. Newby may modify the state-specific instructions.

Second, although the statute requires "approval" by three commissioners, the statute does not indicate that approval requires a formal vote of three commissioners fully adopting or rejecting the document provided to this Court as Plaintiffs argue. ECF 146, at 4. Nowhere does the statute suggest, or even imply, that documents or proposals must be "approved" *in toto*.

There is no indication that "approv[al]" cannot be assessed independently for each proposal in a document containing multiple proposals. Thus, even if responding to this Court's inquiry did constitute an "action" under HAVA, the EAC provided its response from three Commissioners to the central question posited by the Court, an interpretation as to whether Mr. Newby had the authority "to grant or deny state instruction requests under the 2015 Policy Statement." *See* ECF 134.

The Department of Justice ("DOJ") appears to take the same view as Kansas. The DOJ cites to the points of unanimous agreements by the Commissioners, implying that such agreement is all that is required for this Court to consider the EAC's answers to this Court's inquiry. ECF 145, at 6-7 (describing where the Commission was unanimous in its consideration of questions). This approach makes the most sense; and it would be appropriate for the Court to accept the views of the Commission where the three Commissioners are in agreement.

Importantly, all three Commissioners agree that Mr. Newby possesses the authority to modify the State instructions, just as previous executive directors did. ECF 141-1, at 11. Indeed, Commissioner Hicks even *agreed* that the votes following Mr. Wilkey's decision were not required. *See id.* at 13-14. Essentially, Commissioner Hicks disagrees with the *outcome* of this decision, not with the contention that Mr. Newby possessed the authority to make it. If he did, he would have had to have stated that Mr. Wilkey likewise lacked such authority, which he has not. To the extent that Commissioner Hicks believes that Mr. Newby's decision is precluded by the NVRA, ECF 141, at 5, that is a conclusion of law held by only one Commissioner – a conclusion that is incorrect and is subject to review by this Court . And to the extent that Commissioner Hicks asserts that past decisions of the agency are "clear," ECF 141, at 5-6, he neglects to support his assertion or provide anything to contradict the other two Commissioners'

views that Mr. Newby's decision did not violate the NVRA. In sum, this Court asked the Commission whether the Executive Director had been delegated authority to make decisions regarding changes to the State-specific instructions and the Commission responded with a unanimous "yes." Thus, all that remains for the Court to decide is whether Mr. Newby's decision was consistent with the NVRA and with the agency's binding regulations.

## II. The DOJ Misunderstands "Necessary"

The DOJ takes the position that Mr. Newby acted *ultra vires* in modifying the state-specific instructions because "the delegation, whatever its scope, cannot reasonably be interpreted to include violation of the NVRA." ECF 145, at 8. Specifically, the DOJ claims that "[t]his Court already has concluded, based on the administrative record, that the Executive Director made his decision on 'ministerial' grounds, 'review[ing] the request only for clarity and accuracy,' and that he did not determine whether the states 'needed documentary proof of citizenship to enforce their qualifications.'" *Id.* at 6-7 (quoting ECF 133 at 4); *also citing League of Women Voters v. Newby*, 838 F.3d 1, 9-10 (D.C. Cir. 2016)). But the DOJ is making a major assumption in this regard, namely that Mr. Newby's decision violates the NVRA. ECF 145 at 7. No Court has so held. And Mr. Newby reasonably believed that his decision was in perfect compliance with the NVRA. Indeed, the words of the Supreme Court gave him every reason to believe that his decision was *required* by the NVRA

First, the Supreme Court stated that a State "may request that the EAC alter the Federal Form to include information the *State* deems necessary to determine eligibility." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2259 (2013) ("*ITCA*") (emphasis added). These words indicate that it is the State's decision whether or not such information is necessary. The

Supreme Court did *not* hold that a State would have to prove to the satisfaction of the EAC that requiring the information was subjectively "necessary" before the modification could be made. Indeed, to come to this conclusion, one would have to ignore the majority's discussion of the States' Article I, Section 2, authority to set and enforce the qualifications of voters, as well as the "happ[y]" result of avoiding invalidating the NVRA by allowing the EAC to grant a subsequent request from the State of Arizona. *Id.* at 2258-2259.

While the panel majority on the appeal of the preliminary injunction believed that Plaintiffs were likely to succeed on the merits in claiming that Mr. Newby did not make an express and clear finding of necessity based on the record before it, ultimately the D.C. Circuit did *not* identify *what* would constitute such necessity or even address the other relevant text in the NVRA. *See League of Women Voters v. Newby*, 838 F.3d 1, 10 (D.C. Cir. 2016) (failing to address a State's administering voter registration and other parts of the election process). The D.C. Circuit also attempted to sidestep the obvious Constitutional flaw in its reading of the NVRA by claiming that as long as the EAC determined something to be necessary, then it was necessary. *Id.* The ultimate question is *who* makes that determination of what is necessary—a sovereign State or unelected federal bureaucrats at the EAC. The Constitution and the *ITCA* decision make clear that it is the State that makes that determination. *ITCA*, 133 S. Ct. at 2259. Indeed, lost in the D.C. Circuit's opinion is the Court's acknowledgment that the Constitution requires the *States* to "decide the eligibility criteria for voters in federal elections." *Newby*, 838 F3d at 11.

Second, the DOJ ignores the EAC's own binding regulations that compel the EAC to modify the form as requested. The regulatory language *mandates* inclusion of state-specific instructions that describe state voter eligibility and registration requirements:

> The state-specific instructions *shall contain* . . . information regarding *the state's specific voter eligibility and registration requirements*."

11 C.F.R. 9428.3(b) (emphasis added). Mr. Newby's decision can hardly be deemed *ultra vires* if his decision is *compelled* by a binding federal regulation. The D.C. Circuit majority opinion wholly ignored this issue in its rushed decision on the preliminary injunction. Mr. Newby's contemporaneous memorandum demonstrates that he did what the NVRA, Constitution, and binding regulation required — modifying the state-specific instructions so as to accurately reflect what it takes to become registered to vote in Kansas. AR0003-AR0005. In other words, Mr. Newby did consider the relevant factors; and his decision was rationally connected to them. *See PPL Wallingford Energy LLC v. Fed. Energy Regulatory Comm'n*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (citation omitted).

Finally, contrary to the suggestion of the DOJ, ECF 145, 6-7, Mr. Newby did *not* state that the change was not "necessary." What he stated was that the Kansas Secretary of State's "examples of the need for these changes are irrelevant to my analysis." AR0004. Mr. Newby reviewed the specific request – a request to modify the state-specific instructions so that they accurately reflected what it took to be registered to vote in Kansas and which included evidence of non-citizens registering to vote in Kansas, *id.* – and ultimately determined that the change was "necessary and proper" in order to accurately reflect the requirements of Kansas law. ECF 28-2, ¶ 46. Mr. Newby did what the APA requires in modifying the state-specific instructions.

## III. <u>Plaintiffs Still Have Yet to Identify the Adoption of a "Policy" Opposing Proof of Citizenship That Was Adopted by a Vote of Three Commissioners.</u>

Missing from Plaintiffs' Supplemental Brief is the basis for their argument in this case to date—an identification of a date when some alleged "policy" or "precedent" of prohibiting proof

of citizenship on the Federal Form was first created by a vote of three or more Commissioners. *See e.g.* ECF 102, at 24. Yet, throughout litigation, Plaintiffs have insisted that this "policy" or "precedent" must not be disturbed. *See id*. They now argue that this Court should "not giv[e] effect to actions or decisions . . . unless they have the required approval of three Commissioners[.]" ECF 146, at 3. Yet Plaintiffs cannot identify any vote by three Commissioners approving Thomas Wilkey's initial refusal of Arizona's request, because no such vote occurred. Nor can they identify any vote by three Commissioners to approve Alice Miller's refusal of Kansas's and Arizona's requests.

Throughout this case, Plaintiffs ask this Court to reject the decision of Mr. Newby and to elevate the previous decisions of Thomas Wilkey and Alice Miller to the equivalent of a policy adopted by a vote of three Commissioners. Of course, Plaintiffs now ignore the fact that the Commissioners agreed that Mr. Newby possesses the same authority that Mr. Wilkey and Ms. Miller possessed when they made their decisions. ECF 141-1, at 11. The Plaintiffs have a problem if Mr. Newby *cannot* make this decision. It means that neither Mr. Wilkey nor Ms. Miller had the authority to make their decisions either. And Commissioner Hicks's "clarification" regarding an Executive Director's authority, *id.* at 11-12, would provide this Court with no ability to meaningfully review agency action.

Indeed, Commissioner Hicks's position is at odds with the approval of Louisiana's recent request, which was granted by Ms. Miller without a Commissioner vote. *See ITCA*, 133 S. Ct. at 2260, n.11; A000263-AR000267. As Mr. Newby noted, modifying the state-specific instructions to require proof of citizenship was consistent with the changes made to the state-specific instructions of Louisiana and other states where "registration is not complete without this information." AR0004.

At bottom, Plaintiffs want this Court to lock the EAC indefinitely into a position that *Plaintiffs* prefer, despite the fact that three Commissioners have never voted in agreement to adopt that position. If Plaintiffs' argument were to be adopted by this Court, it would call into question the legitimacy of other decisions made by an Executive Director where modifications were made to state-specific instructions without a Commissioner vote. The reality is that the Executive Director has been making decisions regarding state-specific instructions, for more than a decade and Plaintiffs only now see a problem with the authority of the Executive Director when they disagree with the substance of the decision.

## IV. <u>This Court Should *Not* Wait for an Unknown Period of Time Until There is a "Consensus" of the Commissioners</u>

The DOJ again suggests the Court vacate and remand this case. ECF 145, at 8. In doing so, the DOJ hypothesizes about what "may" occur at some point in the future. *Id.* Similarly, the Plaintiffs seek a *vacatur* and remand. ECF 146, at 4. What the DOJ and Plaintiffs ignore is the inverse of what they are asking—the fact that sovereign States seeking to enforce their voter qualifications, and seeking to ensure the integrity of their elections are being blocked by Commission inaction. This constitutional prerogative of the States cannot simply be put on hold for the indefinite future. Indeed, as the *ITCA* Court noted, if a shortage of commissioners prevented the EAC from answering a State's request, the State could seek immediate redress in federal court. *ITCA*, 133 S.Ct. at 2260.

The first time the issue of a proof of citizenship state-specific instruction was brought to the EAC was in 2006, and the Commission split 2-2 on the question after the Executive Director unilaterally refused to modify Arizona's state-specific instructions. ECF 133, at 10-11. Likewise, in the years since that indecisive non-decision of the Commissioners, the

Commissioners of the EAC have never garnered three votes either approving or rejecting such a change. Consequently, the Commissioners have never established a policy or precedent on the question; and the only action that has occurred has been by unilateral Executive Director decision. Thus, the appropriate measure for this Court is *not* to remand to the agency again and hope that at some, unknown future time, three Commissioners will approve or reject the request, allowing a Court to review it at that juncture.

The appropriate response for this Court is to decide the issue now. It is clear that *if* this decision were vacated and remanded and Kansas submitted yet *another* request, the result would continue to be the same outcome as it is now (assuming Plaintiffs are correct that Mr. Newby lacks the authority to make the decision). Mr. Hicks has stated his personal belief that a proof-of-citizenship requirement violates the NVRA. ECF 141-1, at 5. Thus, a remand has one of two results. Kansas requests the modification (for a third time) and again three Commissioners fail to agree. Or, the Commission does not vote at all. What is *not* likely to occur is what the DOJ is claiming might occur—that the Commissioners "may" decide the issue. Given that the Commissioners have already agreed that Mr. Newby has the authority to modify state-specific instructions, it is wholly inappropriate to leave Kansas waiting in limbo. Kansas is a sovereign State that is being prevented from exercising its constitutional authority to set and enforce voter qualifications and is being prevented from implementing its duly-enacted law. The Supreme Court has made clear that such a situation of "inaction" cannot be allowed to persist. *See ITCA*, 133 S. Ct. at 2260 ("Should the EAC's inaction persist, Arizona would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement . . ."). The statutory and constitutional questions have been presented in full. This Court must now decide them.

## V. <u>If this Court Remands Again, the Proper Action is not to Vacate But to Seek Clarification From Mr. Newby</u>

If, however, this Court agrees with the DOJ that remand is (again) appropriate, then the Court should not vacate the EAC's decision. The purpose of this Court's initial remand was to gain some clarification from the Commission as to the extent of Mr. Newby's authority. The Commissioners *agreed* that the authority delegated to Mr. Newby to make changes to State Specific instructions has not changed from the authority of previous Executive Directors. ECF 141-1, at 14; ECF 145 at 4-5. Thus, the remaining question is whether Mr. Newby's decision was a proper decision.

An agency's decision does not have to be crystal clear. The relevant standard only requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *PPL Wallingford Energy LLC,* 419 F.3d at 1198. A court "must affirm the agency if a rational basis for the agency's decision exists' even if not entirely clear, so long as [the] 'agency's path may reasonably be discerned.'" *Water Quality Ins. Syndicate v. U.S.*, 522 F. Supp.2d 220, 225 (*quoting Hornbeck Offshore Transp. v. U. S. Coast Guard*, 424 F. Supp. 2d 37, 45-46 (D.D.C. 2006)). Mr. Newby provided his explanation—he looked at the request of Kansas and determined that the requested instruction correctly reflected Kansas's statutory requirements. ECF 28-2, ¶¶ 37-48; AR0002-AR0005. That is a rational decision consistent with the Constitution and the text of the NVRA. It is also compelled by the agency's binding regulation. Mr. Newby also provided a separate letter to this Court, which Plaintiffs continue to ignore, further explaining that he in fact did decide the State's request was "necessary." *See* ECF 28-2, ¶46. Moreover, Kansas has discovered even more evidence of noncitizens registering to vote

and attempting to register to vote since that time. *See Fish v. Kobach*, No. 16-2105, ECF 384-10.

If this Court still needs clarity regarding the basis for the decision, the proper action is not *vacatur* and remand. It is to seek clarification from the "decisionmaker," who the DOJ and the Commission acknowledge is Mr. Newby. *See* ECF 141-1, 11-12 (agreeing that Mr. Newby has the authority to make decisions but disagreeing as to when a decision is a policy). Thus, if this Court still believes there is not an adequate explanation, the appropriate action would be to seek a clarification from *Mr. Newby* who it has been clarified is the decisionmaker for purposes of modifying the state-specific instructions. *See Alpharma Inc. v. Leavitt*, 460 F.3d 1, 6-7 (D.C. Cir. 2006) (accepting a letter explaining a decision which was made thirteen years prior). This would be the most efficient approach for this Court to take, should the Court determine that the record is still unclear.

**CONCLUSION**

For all of these reasons, this Court should sustain the EAC's Executive Director's decision and grant summary judgment in favor of Defendant and Defendant-Intervenors. Accordingly, Plaintiffs' Cross-Motion for Summary Judgment should be DENIED; Defendants' Partial Motion for Summary Judgment should be DENIED; Kansas's Cross-Motion for Summary Judgment should be GRANTED; and the EAC's decision of January 29, 2016, should be given effect and the requested language be added again to the state-specific instructions of the Federal Form.

Dated: August 28, 2017

Respectfully submitted,

/s/ Kris W. Kobach*

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## CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2017, I caused the foregoing brief to be filed with the United States District Court for the District of Columbia via the Court's ECF CM/ECF system, which will serve all registered users.

*/s/ John Miano*